IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 13, 2007

ROSE MARIE REIFER v. RICHARD EDWARD REIFER

Appeal from the Chancery Court for Dickson County
No. 8268-03 Robert E. Burch, Judge

No. M2004-02760-COA-R3-CV - Filed July 18, 2007

Husband and Wife were before a Special Master to divide their property in an action for divorce. During the pendency of the hearing, Husband and Wife entered into a settlement agreement, initialed the agreement, and informed the Special Master of the agreement. Based upon such information, the Special Master terminated the proceedings. Prior to an order being entered, Husband withdrew his consent to the agreement. Wife filed a Motion to Enforce Agreement, which the trial court granted. Husband appealed. The judgment of the trial court granting Wife's Motion to Enforce Agreement is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Jennifer Davis Roberts, Dickson, Tennessee, for the appellant, Richard Reifer.

Jack L. Garton, Dickson, Tennessee, for the appellee, Rose Marie Reifer.

OPINION

I. FACTUAL BACKGROUND

Richard Reifer ("Husband") and Rose Marie Reifer ("Wife") were married on January 13, 1989. On March 11, 2003, Wife filed a Complaint for divorce from Husband on the grounds of irreconcilable differences and inappropriate marital conduct. The parties had one child ("the child"), a minor at the time of the divorce. With the Complaint, Wife filed a Proposed Parenting Plan seeking designation of primary residential parent status of the child. Husband responded, denying the development of irreconcilable differences or inappropriate marital conduct, and asserting that Wife's Proposed Parenting Plan was not in the best interest of the child. Subsequently, the parties

became exceedingly contentious, both filing motions for contempt and restraining orders with the court.

On February 13, 2004, the court entered the following Stipulated Order to Intervene, allowing Husband's mother to intervene for limited purposes:

> It appearing to the court from the undersigned signatures of counsel that the parties agree that Emma Jean Reifer Adams is hereby allowed to intervene in the above styled divorce action for the limited purpose of determining property rights to Real Property and Business Interest of the respective parties. The ability to intervene is stipulated to by all parties pursuant to Rule 24 of the Tennessee Rules of Civil Procedure[[1]].

On February 18, 2004, the court issued the following Agreed Order:

> As evidenced by the signatures of counsel for all parties in this case, the parties are in agreement that this matter shall be referred to a Special Master in order for the Special Master to prepare a final report for use by this Court in determining property issues.
>
> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this matter shall be immediately referred to a Special Master. The Special Master shall conduct appropriate hearings and fact finding, and the Special Master shall prepare a report to this Court detailing the findings of the Special Master regarding the following issues:
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> 1. What items are marital property vs. separate property?
> 2. The appropriate value of all marital property.
> 3. The location of all marital property. . . .

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[1] Tennessee Rule of Civil Procedure 24 states the following in relevant part:

> **24.01. Intervention as of Right.** -- Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties; or (3) by stipulation of all the parties.
>
> **24.02. Permissive Intervention.** -- Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising discretion the court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

It is unclear from the record which section of the rule allowed Adams' intervention.

The hearing before the Special Master took place on March 30, 2004; the record contains no reference to the hearing other than statements of counsel at a later hearing. During the pendency of the Special Master's hearing, the parties reached a settlement agreement, reducing such agreement to writing. The handwritten document stated the following:

> Counter-offer
> 1. He will pay her a cash payment of $99,700 not later than 120 days following entry of Final Decree.
> 2. She will quitclaim all interest to him in farm, business, [and] house.
> 3. She will be awarded following items of specific personal property; otherwise, they each keep what they have:
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> 2 fireworks trailers (Aljo [and] Suno)
> Firework tent [and] tables
> cherry entertainment center
> Mr. Hobb's stuff
> cherry wood in shop
> 13" planer
> 10" miter-saw
> antique wardrobe
> antique 3 piece bedroom suite
> Toyota Truck
>
> 4. The parties enter a parenting plan. They will share legal [and] physical custody of son. Exchange child each Sunday evening at 8:30 pm. One week w/ each parent. Summer divided equally. All other breaks [and] holidays divided equally. No child support by either party. Mr. Reifer will carry insurance. Both parties will pay ½ of noncovered medicals, dental, etc. Child must remain in Dickson County schools. Joint decision making. Alternate years for income tax deduction.
> 5. Divide 2003 income tax return proceeds if filed jointly.

At the bottom of the page appears two sets of initials. The first is R.R. The second is also R.R., and is dated 3-30-04.

Sometime subsequent to the parties executing the agreement, Husband changed his mind and repudiated the agreement. On September 23, 2004, Wife filed a motion asking that the court declare the handwritten document to be a binding contractual agreement regarding the settlement of property. At the Motion to Enforce Agreement, on September 30, 2004, the handwritten agreement was explained as follows:

> [Counsel for Wife]: Your Honor, we were in the stages of conducting a special master's hearing on this case; in fact, we were over in the master's courtroom conducting a special master's hearing in front of Mr. Bullion. It was kind of a lengthy proceeding, and during the proceeding, I believe Mr. Reifer had been

> questioned and we had gone through everything that we had gone through and we took a break and began negotiations for maybe possibly settling the case.
>
> And so I discussed things with my client and we submitted to [Mr. Reifer] an offer of settlement, and [Mr. Reifer] . . . came back to me with a counteroffer. . . .
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> And I discussed that with my client and we agreed upon that, and the parties put their initials to the agreement and we began the process of – we terminated the remainder of the special master's hearing and told Mr. Bullion we had an agreement and then proceeded to go back to our offices and begin the process of drafting the final documents. And in the course of this somewhere along the line, Mr. Reifer decided this was not – he was not going to enter into this agreement.
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> . . . .
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> The Court: The special master's hearing was in process when this was agreed upon, and then at that point I presume that nothing further happened after that.
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> [Counsel for Wife]: No, sir. We took a short break and began the negotiating process and then we came back. And once we had this counteroffer signed off on, we told Mr. Bullion . . . we have an agreement, and Mr. Bullion said fine and he terminated the special master's hearing proceedings at that time.

In granting Wife's Motion, the court said: "The court's of the opinion that this agreement is enforceable. Mr. Reifer gave offer, it was accepted. It was in the process of adversarial proceedings and based upon this agreement the proceedings were terminated and I think that he should be held to it." The court went on to clarify that it granted the motion only as to property issues, and not any issues regarding the child.

The court issued its Order on the matter on January 6, 2005, granting Wife's motion and declaring the written agreement to be binding, declaring the parties divorced, and adopting a Final Decree and Parenting Plan. On appeal, Husband asserts that the trial court erred by entering a consent order adopting a marital dissolution agreement and parenting plan which was not agreed to by both parties. Further, Husband asserts that the trial court erred in ruling that Husband was contractually bound by the terms of the settlement agreement.

II. STANDARD OF REVIEW

Review of the trial court must be in conformance with Tenn. R. App. P. 13(d), which states that "review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. . . ." Tenn. R. App. P. 13(d).

III. ANALYSIS

When Wife submitted her order reflecting the September 30, 2004 ruling of the court, she also included a Final Decree of Divorce, a Marital Dissolution Agreement, and a Parenting Plan.

Husband maintains that because execution of the order occurred after the court was made aware of Husband's repudiation and withdrawal of consent to the agreement, such execution was invalid.

The analysis must begin with a specific line of Tennessee cases. In *Harbour v. Brown*, No. 577, 1986 WL 6848 (Tenn.Ct.App. Jan. 5, 1987), Harbour purchased a tract of land from Ulrich in 1981. The two worked out a payment scheme, with the total purchase price to be paid by 1984. When Harbour failed to pay for the land in full, Ulrich filed suit to recover the money promised him. The matter was set for trial in April of 1985. On the morning of the trial, counsel for the parties announced to the court that they had reached an agreement and would submit an order of compromise and dismissal. Subsequent to the announcement, but prior to any order being entered, Ulrich withdrew his consent to the compromise. The Chancellor refused to vacate the order and dismissed the cause. Ulrich appealed.

Because no record was provided, this Court affirmed the Chancellor's ruling, finding that Ulrich did not file a Motion to Vacate until after the order of compromise and dismissal was entered. The case was remanded back to the Chancellor on the issue of affixing damages for a frivolous appeal. In affirming the trial court, this Court stated that:

> Compromise settlements are looked upon with favor and the general rule in practically all jurisdictions is that a compromise settlement will not be disturbed, changed, or set aside without the consent of the parties unless there was fraud, mutual mistake, or actual absence of consent, and then only by appropriate legal proceedings. In the instant case we have no allegation of fraud or mutual mistake, just an assertion that Mr. Ulrich no longer consents to the compromise.

Harbour, 1986 WL 6848 at *1.

The matter went on to the Supreme Court of Tennessee and was reversed and remanded, relevant portions of the opinion appearing below:

> This appeal presents the single question: Can a trial judge enter a valid Order of Compromise and Dismissal after being informed by one of the parties that consent to the compromise has been withdrawn? We hold that he can not and reverse the judgment dismissing the action. . . .
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> . . . .
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> The resolution of disputes by agreement of the parties is to be encouraged. But a valid consent judgment can not be entered by a court when one party withdraws his consent and this fact is communicated to the court prior to entry of the judgment. *Van Donselaar v. Van Donselaar*, 249 Iowa 504, 87 N.W.2d 311 (1958); *Lee v. Rhodes*, 227 N.C. 240, 41 S.E.2d 747 (1947); *Norton Shores v. Carr*, 59 Mich. App. 561, 229 N.W.2d 848 (1975). *Cf. Kittrelle v. Philsar Development Co.*, 50 Tenn. App. 84, 359 S.W.2d 837 (1962).

> The general rule defining the power of a court to enter a consent judgment is set forth in 49 C.J.S. Judgments § 174(b), as follows: The power of the court to render a judgment by consent is dependent on the existence of the consent of the parties at the time the agreement receives the sanction of the court or is rendered and promulgated as a judgment.
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> In making reference to the general rule in *Burnaman v. Heaton*, 150 Texas 333, 240 S.W.2d 288 (1951), the court emphasized that: A valid consent judgment cannot be rendered by a court when the consent of one of the parties thereto is wanting. It is not sufficient to support the judgment that a party's consent thereto may at one time have been given; consent must exist at the very moment the court undertakes to make the agreement the judgment of the court.
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> The reason for the rule is that a consent judgment does not represent the reasoned decision of the court but is merely the agreement of the parties, made a matter of record by the court. *Van Donselaar v. Van Donselaar*, 249 Iowa 504, 87 N.W.2d 311 (1958). And, until entered by the court, the matter being the question of an agreement between the parties, either party may repudiate the agreement because of an actual or supposed defense to the agreement. This is not to say that the compromise agreement may not be a binding contract, subject to being enforced as other contracts, but only that the court may not enter judgment based on the compromise agreement, when it has notice that one of the parties is no longer consenting to the agreement for whatever reason.
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> There is no question in this case but that the trial judge knew before he entered the Order of Compromise and Dismissal that the defendant had repudiated the agreement. This being so, the trial judge was without power to enter the Order of Compromise and Dismissal. Accordingly, the judgment is reversed and the case is remanded to the trial court for further proceedings.

Harbour v. Brown, 732 S.W.2d 598, 599-600 (Tenn.1987).

Upon remand, the trial court, with guidance from the Tennessee Supreme Court's ruling, put aside the consent judgment issue and found that the compromise agreement represented a valid and enforceable contract between the parties. Again, Ulrich appealed the trial court's ruling. Without elaborating on its reasoning, this Court affirmed the trial court's ruling. *Harbour v. Brown*, No. 839, 1989 WL 22712, at *3 (Tenn.Ct.App. Mar. 17, 1989). The *Harbour* line of cases, although not always absolutely controlling, lays the foundation for analysis of situations like the one at hand.

Later, cases developed which established an exception to the Tennessee Supreme Court's strict rule in *Harbour*.

> Thus, in the context of the treatise relied upon by the Supreme Court in its *Harbour* decision, even if a settlement agreement can be enforced through later entry of a consent order if the agreement had consent of all parties at the time it was approved by the court, the parties' prior oral agreement must have been made "in

> open court" or in a "hearing" wherein the fact and the terms of the agreement were determined. The terms of the agreement must also be reflected in the record. Oral statements to a judge in any other context are not sufficient.
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> . . . .
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> This court, in interpreting *Harbour*, has sometimes drawn a determinative distinction on the basis of whether the terms of the settlement which preceded the entry of an order of settlement were announced to the court on the record or whether just the existence of an agreement was announced.
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> . . . .
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> In [two] cases distinguishing *Harbour*, the detailed terms of the agreement were presented in open court and on the record, the trial court's acceptance of the agreement was also made in open court and on the record, and a record or transcript existed, independent of the order later entered, which documented the fact and terms of the agreement.
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> . . . .
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> In essence, they recognize, in furtherance of other well-settled principles, an exception to *Harbour*'s often-quoted general rule. That exception, when applicable, would allow the entry of a consent order of compromise and settlement which merely documents an earlier agreement even where consent does not exist at the time of entry of the written order. Stated differently, there are situations where a party will not be allowed to withdraw its consent to an oral agreement prior to entry of a judgment based on that agreement. At the least, this exception applies to agreements made in open court, on the record, where the detailed terms of the agreement are presented to the court, accepted by the court, and preserved by transcript or other acceptable record of the court proceedings.

Environmental Abatement, Inc. v. Astrum R.E. Corp., 27 S.W.3d 530, 537-9 (Tenn.Ct.App.2000). Stated differently,

> The *Harbour* rule dealing with consent judgments is clear. A court may not enter a consent judgment based upon an agreement of the parties when the *terms* of the agreement are not announced to the court as a consent judgment and when one of the parties repudiates the agreement prior to the entry of the judgment.

McMahan v. McMahan, No. E2004-03032-COA-R3-CV, 2005 WL 3287475, at *4 (Tenn.Ct.App. Dec. 5, 2005). In the case at hand, the record is silent as to whether the terms of the agreement were made known to the Special Master. According to Wife, the Special Master was simply told that an agreement had been reached, and the final order would be submitted at a later date. Based upon such information, the Special Master terminated the proceedings. Because the terms of the agreement were not announced to the Special Master, this exception to the *Harbour* rule, allowing the entry of a consent judgment even after consent is withdrawn by a party, does not assist Wife in this case.

At this point in our analysis, we further interpret the Harbour reasoning, specifically narrowing our focus to precise terms. Harbour and its progeny focus on consent judgments. It is important to note that the entry of a consent judgment is different from the enforcement of a signed settlement agreement. The trial court ruled in favor of a Motion to Enforce Agreement. The United States District Court for the Western District of Tennessee explains the distinction between entering a consent judgment and enforcing a settlement agreement:

> [P]laintiffs assert that this court lacks authority to enforce the settlement agreement because plaintiffs have withdrawn any assent to the settlement. To support their position, plaintiffs direct the court to the Tennessee Court of Appeals' holding in *Environmental Abatement, Inc. v. Astrum R.E. Corp.*, 27 S.W.3d 530, 539 (Tenn.Ct.App.2000). *Environmental Abatement* holds that a court may not enter judgment based on a settlement agreement when it has notice that one of the parties has withdrawn its assent to the agreement. However, the Court of Appeals emphasized that its holding applies only to an entry of a consent judgment, stating that its analysis "is not to say that the compromise agreement may not be a binding contract, subject to being enforced as other contracts . . . ." *Id.* In the present case, since [defendant] asks the court to enforce the settlement agreement rather than to enter a consent judgment, the withdrawal of plaintiffs' assent to the terms of the agreement does not affect the enforceability of the settlement agreement.

Anglo-Danish Fibre Indus. v. Columbian Rope Co., No. 1-2133 GV, 2002 WL 1784490, at *6 (W.D.Tenn. June 21, 2002). This Court agrees with such reasoning and draws its own distinction between the two. Further, this Court interpreted *Harbour* in 2005 as follows:

> The *Harbor* (sic) Court reversed the trial court's judgment and remanded the case for hearing. The parties had apparently entered into a written contract on the day of settlement, and upon remand the chancellor found the contract to be enforceable and awarded damages for the breach. *Harbour v. Brown*, 1989 Tenn. App. LEXIS 204, 1989 WL 22712 (Tenn. Ct. App. March 17, 1989). This court affirmed the ruling. *Id.*
>
> The final result was in accord with the Supreme Court's opinion in *Harbor* (sic), i.e.:
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> > This is not to say that the compromise agreement may not be a binding contract, subject to being enforced as other contracts, but only that the court may not enter judgment based on the compromise agreement, when it has notice that one of the parties is no longer consenting to the agreement for whatever reason.
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> *Harbour v. Brown*, 732 S.W.2d 598 at 600 (Tenn.1987). *Cf, Environmental Abatement, Inc. v. Astrum R.E. Corp.*, 27 S.W.3d 530 (Tenn.Ct.App.2000). (The parties had attended a mediation, and had come to an agreement, but it had not been reduced to writing and signed by the parties. One party withdrew consent to the agreement the next morning, and this Court held the agreement was not enforceable).

> However, the Supreme Court recently reiterated that written and signed mediation agreements must also be "analyzed under contract law", as was recognized both in *Harbour* and *Environmental*. *Ledbetter v. Ledbetter*, 163 S.W.3d 681, 2005 Tenn. LEXIS 345, 2005 WL 775386 (Tenn. Apr. 7, 2005). Moreover, this Court has previously held that signed, written settlement agreements are enforceable as contracts, under general principles of contract law. *See Vacarella v. Vacarella*, 49 S.W.3d 307 (Tenn. Ct. App. 2001); *Persada v. Persada*, 2002 Tenn. App. LEXIS 952, 2002 WL 31640564 (Tenn. Ct. App. Nov. 22, 2002); *Golden v. Hood*, 2000 Tenn. App. LEXIS 47, 2000 WL 122195 (Tenn. Ct. App. Jan. 26, 2000).
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> In this case . . . [t]he evidence presented was that the wife had simply changed her mind, and as with any written contract, one cannot be released from one's obligations thereunder simply due to a change of heart. *Smithart v. John Hancock Mut. Life Ins. Co.*, 167 Tenn. 513, 71 S.W.2d 1059, 1063 (Tenn.1934). . . .

Myers v. Myers, No. E2004-01362-COA-R3-CV, 2005 WL 936925, at *2-3 (Tenn.Ct.App. Apr. 22, 2005). Similarly, in the case at bar, Husband simply changed his mind after entering into the agreement with Wife, and such change of heart should not be an available avenue for breaching an agreement.

As further stated by this Court in 2005,

> The well-settled law in this jurisdiction is that marital dissolution agreements are accorded the same interpretive dignity as any other contract entered into between willing parties. *See Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn.2001). The rules of interpretation give cardinal importance to the plain and unambiguous terms of contracts when determining the intent of the parties.
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> A marital dissolution agreement is essentially a contract between a husband and wife in contemplation of divorce proceedings. *See Towner v. Towner*, 858 S.W.2d 888 (Tenn.1993). "A property settlement agreement between a husband and wife is 'within the category of contracts and is to be looked upon and enforced as an agreement, and is to be construed as other contracts as respects its interpretation, its meaning and effect.'" *Bruce v. Bruce*, 801 S.W.2d 102, 105 (Tenn.App.1990) (quoting *Matthews v. Matthews*, 24 Tenn.App. 580, 593 148 S.W.2d 3, 11-12 (1940)).

Rowan v. Rowan, No. M2003-01668-COA-R3-CV, 2005 WL 195117, at *5 (Tenn.Ct.App. Jan. 27, 2005).

Husband is attempting to avoid an agreement that he negotiated, signed, and endorsed to the court. The parties' endorsement of such agreement halted the judicial proceeding that was in progress. The Special Master rightfully halted the proceedings, thereby avoiding the waste of judicial resources; there was no reason to continue the process once an agreement had been reached by the parties.

Husband asserts that the settlement agreement cannot be considered a marital dissolution agreement or separation agreement, as a complete evidentiary hearing is necessary to determine if the handwritten document is contractually binding. Further, Husband asserts that Emma Jean Reifer Adams ("Adams") was allowed to intervene in the action, and she was not involved in the negotiation and agreement; only Husband's and Wife's initials appeared on the agreement. Such reasoning is unpersuasive.

The trial court specifically found offer and acceptance. Wife indicated to the court that Husband was offered terms under a settlement agreement and responded with a counter-offer. The counter-offer is even handwritten by Husband's counsel and entitled "Counter-offer." Acceptance was indicated before the Special Master. The agreement of the parties is enforceable under contract principles, as the trial court and Court of Appeals eventually decided in *Harbour*, and as indicated by the later cases interpreting *Harbour*. As for the third party Adams' lack of involvement in the agreement, she has neither filed a brief nor asserted any rights before this Court. Husband does not represent the rights of the third party. Therefore, this Court does not address the third party.

Another overriding reason exists compelling us to affirm the action of the trial court. We have been provided with no record of proceedings in the trial court which would allow for meaningful appellate review. There is an Agreed Order entered February 18, 2004, specifically referring to a Special Master for appropriate hearings and fact-findings relative to:

1. What items are marital property versus separate property?
2. The appropriate value of all marital property.
3. The location of all marital property.

The matter was set for hearing by this order of the chancellor before the Special Master on March 4, 2004, at 9:00 a.m.

Nothing else appears in the record until September 23, 2004, when counsel for Wife filed a motion to have the court declare that a certain contractual agreement of March 30, 2004, be declared a binding contractual agreement.

This is followed by an order of the trial court following an apparent hearing of September 30, 2004, which order was signed by the trial judge on November 29, 2004, and filed of record on January 6, 2005. This order provides in pertinent part, "It is, therefore, ordered, adjudged, and decreed that the written agreement entered into by the parties on March 30, 2004 be, and it is hereby, declared a binding, contractual agreement . . . ."

It is from this order that appeal is taken. All we have in the form of a testimonial transcript is the argument of counsel on Wife's motion to enforce the alleged agreement. The all important proceedings before the agreed Special Master, who is after all a judicial officer agreed upon by the parties and designated by the chancellor, are nowhere preserved for appellate review. The burden

of preparing and filing a proper record for appellate review rests upon Husband. *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn.Ct.App.1992).

IV. CONCLUSION

The judgment of the trial court granting Wife's Motion to Enforce Agreement is affirmed. Costs of the cause are assessed to Husband.

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WILLIAM B. CAIN, JUDGE